# Supreme Court of the United States

OCTOBER TERM—1942

No. 610

EMANUEL WEISS,

Petitioner,

*against*

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, EMANUEL WEISS, respectfully represents the following:

### Summary Statement of Matter Involved

Your petitioner, together with Louis Buchalter and Louis Capone, was convicted of murder in the first degree in the County Court, Kings County, New York State, on December 2, 1941 and was sentenced to be executed.* On an appeal to the Court of Appeals of the State of New York, the judgment of conviction was affirmed by a divided court. The defendant is under sentence of death as a result of a

* A stay of execution was granted by the order of Mr. Justice Roberts dated Dec. 5, 1942.

trial which, viewed in its entirety, was so grossly unfair that he was denied due process of law. The terse statement of Judge Rippey, dissenting in the Court of Appeals, is (R. 4090; 289 N. Y. 243):

> "In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration of the jury of their defenses. * * *."

There were four opinions written by members of that Court (R. 4030-4091; 289 N. Y. 181). Of the seven Judges of the Court of Appeals, two (Finch and Lewis, JJ.) concurred in an opinion for affirmance by Judge Conway (R. 4030; 289 N. Y. 181), who found no substantial error in the proceedings.

Judge Loughran, with whom Judge Desmond concurred, wrote for reversal (R. 4078; 289 N. Y. 181), saying at page 242:

> "We do not see how the conviction of the defendants can be affirmed, without annulling the statute which makes the jury in a criminal case the exclusive judges of questions of fact. Nor do we see how an affirmance is possible without deciding that in a criminal case the trial judge in his charge may entirely ignore the evidence and the contentions of the accused unless in the end some request is made for a different handling of the issues.
>
> * * * * * * * *
>
> "We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury."

Judge Rippey, in a separate opinion, voted not only to reverse, but to dismiss the indictment as well (R. 4090; 289 N. Y. 181). He said at page 243:

> "In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact

as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable doubt. * * * In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt."

Of particular interest is the opinion of Chief Judge Lehman, who cast the deciding vote (R. 4069; 289 N. Y. 222). The Learned Chief Judge concurred in the affirmance with obvious reluctance, expressing the gravest doubts relative to the fairness of the trial. He wrote (R. 4073; 289 N. Y. 181, at p. 225):

"The errors and defects in this case are, it seems clear to me, many. Judge Loughran* has set forth some which in his opinion cannot be disregarded. I agree with him that these errors and defects are present and these errors and defects and others shown by the record cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment, tainted with errors and obtained through violation of fundamental rights. Only careful, I might almost say prayerful, consideration can remove that hesitation."

Again at page 230 (R. 4077-4078):

"True, as I have said earlier, the court in the charge instructed the jury as matter of law upon some questions of fact which only the jury had the right to determine, and I may add parenthetically that I doubt whether I would agree with the inferences drawn by the trial judge even if he had been the trier of the facts. I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly

* Who wrote for reversal.

disregarded. Even so, I conclude that in this case the errors viewed as part of a long trial could not have affected the verdict.

* * * * * * *

"I cannot refrain from repeating in conclusion that I find the errors and defects numerous and I have hesitated long in reaching the conclusion that they may be disregarded, especially since three of my associates are convinced and have argued persuasively that they affect the substantial rights of the defendants. I regret many incidents that occurred at the trial. I regret the summation of the prosecuting attorney and his remarks in the course of the trial. I regret some of the rulings of the trial judge. Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind. All that is immaterial if the jury is convinced of guilt on sufficient evidence and no errors and defects affected the verdict. Even if I were entirely convinced of the defendants' guilt I should vote to reverse if I found room for doubt that the jury would have reached the same conclusion if all error had been avoided. Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm."

The remittitur recites (R. 4095):

"Appellant, in his brief and argument raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necesarily decided by this Court."

A motion for reargument, reference to which will be made hereafter, was denied by the Court of Appeals (R. 4121).

## Question Presented

The question presented is whether petitioner Weiss has been deprived of his liberty and life without due process of law. Petitioner does not urge any error in the assess-

ment of evidence which is within the State's function. (Cf. *Hill* v. *Texas*, 316 U. S. 400, 406.) The complaint is not of the commission of mere error, but of wrongs so fundamental that the proceedings in the State Court were a mere pretense of a trial which rendered the conviction and sentence void. (*Brown* v. *Mississippi*, 297 U. S. 278, 286.)

Tested by an appraisal of the totality of the facts in the case at bar (*Betts* v. *Brady*, 316 U. S. 455, 462), the record discloses that petitioner Weiss has been deprived of the constitutional guarantee of the due process of law, and that he was not in fact accorded a trial consonant with the safeguards of the Constitution of the United States, the Constitution of the State of New York, and those basic criteria of fairness which lend life to the concept of due process.

A. The trial was held in a locality and at a time when the members of the community were inflamed by the public press to a degree that Weiss was deprived of a fair trial.

B. The verdict was not that of the jury because the trial judge in his instructions had withdrawn from that body's consideration factual determinations which lay solely in the jury's province.

C. The assurances given by the prosecutor to the jury that the witnesses who, by their own admissions were accessories to the murder, but who had not been indicted, would be brought to justice after defendants had been convicted, and the withholding of information having a bearing upon the truthfulness of the prosecution's witnesses contributed to a result which violates the elementary principle that "criminal proceedings are instituted with the object, not alone of securing convictions, but of getting as near to the truth as possible on the question of the guilt or innocence of the accused." (*Centoamore* v. *State*, 105 Nebraska 452, 455.)

D. The Trial Judge, by his harsh rebukes and repression of defendants' counsel, and by interference with their

examinations, cross-examinations and objections, prevented counsel from adequately presenting petitioner's case; during the examination, he interposed excuses tending to condone palpable perjury committed by the murderers and gangsters who gave the testimony incriminating the defendants. The testimony so given, to quote the statement of Chief Judge Lehman in the Court of Appeals, was "impeached, if not completely destroyed", by cross examination. Yet, at the trial, this very cross-examination was discredited in the eyes of the jury by the Trial Court.

E. The Trial Judge refused to allow petitioner's counsel to examine police records which were in Court in possession of the District Attorney and which petitioner believes contained substantial evidence in his favor but of the contents of which petitioner is still wholly ignorant.

F. The Trial Judge in his charge (R. 3949-3950) told the jury respecting petitioner's alibi, merely that they should acquit if they believed his alibi, thus depriving petitioner of the benefit of the fundamental principle that an accused is presumed innocent until proved guilty beyond reasonable doubt.

## The Trial and its Setting

Joseph Rosen was shot and killed on Sunday, September, 1936. Some three and a half years later, in May, 1940 (R. 21-24), the Grand Jury indicted petitioner Weiss, Louis Buchalter, Louis Capone, Philip Cohen, James Ferraco and Harry Strauss for the crime.* The trial was set for August 4, 1941 (R. 24, 178) and was then adjourned until September 15, 1941, when it actually commenced (R. 24, 181).

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* A severance was granted to Cohen, Ferraco had not been apprehended at the time of trial, and Strauss had been executed for the murder of Irving Feinstein.

During this interval between the issuance of the indictment and the commencement of the trial, there was engendered a wave of public hysteria, which mounted in intensity and reached a crescendo on the very eve of the impaneling of the jury. Mob psychology, which infected the proceedings, did not take the simple form of physical violence against the person of the petitioner Weiss. More subtly, but with equally devastating effect, he was engulfed in a maelstrom of public excitement and passion, brought about by a newspaper campaign directed against the defendant Buchalter.

Some fertile brain had conceived the gruesome slogan "Murder, Incorporated" to describe an indeterminate group of criminals accused of committing murder for hire. The defendant Buchalter and one Shapiro, it was said, employed "Murder, Incorporated" when they wanted slaying done. "Murder, Incorporated" became a catchword in the newspapers to describe this indefinite combination of individuals whom the militant District Attorney of Kings County was pursuing, and through whom he sought to reach "Lepke" Buchalter and "Gurrah" Shapiro.

As early as October, 1940, there appeared in a newspaper a story which said in part (R. 87):

> "But now Lepke faces the electric chair as a result of the smashing of Murder, Inc. by District Attorney William O'Dwyer of Brooklyn."

Another portion of the story (R. 89) quotes Mr. O'Dwyer as exclaiming "jubilantly":

> "At last I've got Lepke and Capone on the way to the chair."

In November, 1940, there was a statement in a newspaper (R. 90) that Buchalter was officially reported "last night to be ready to buy his life by revealing to District

Attorney O'Dwyer of Brooklyn all that he knows about the underworld".

This atmosphere of hostility was intensified and made a matter of even greater public interest when the Honorable William O'Dwyer, then District Attorney of Kings County, was acclaimed as a possible nominee for the candidate for the office of Mayor of the City of New York. According to the "Daily Mirror" of July 10, 1941 (R. 91):

> "One reason given yesterday for O'Dwyer's first place position is that he 'seems to be the only man who could best LaGuardia'. The Brooklyn prosecutor is expected to strengthen his candidacy further by a successful prosecution of Louis (Lepke) Buchalter, due to go on trial Aug. 4 for the murder of Joseph Rosen, ex-member of the Murder Syndicate, 'erased' as an informer."

These, and statements of similar import, continued to fill the public prints.

In July, 1941, applications had been made by the petitioner Weiss and by Buchalter and Capone for a change of venue (R. 76-109).* These were denied (R. 165, 167). Capone had moved for a severance of the indictments and the granting of a separate trial to himself (R. 31-54). This was denied (R. 29).

The case came on for trial on August 4, 1941 (R. 178-90. Out of a jury panel of 250, all but 95 either failed to appear or presented excuses to be relieved from service (S. M. 31.)**

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* References to similar applications by Weiss and Capone appear in the District Attorney's affidavit and the opinion of the Judge (R. 125, 126, 165).

** The record of the proceedings on August 4th and 5th and the examination of the venire on the voir dire are not in the printed record, but are contained in the typewritten report which, by stipulation, was made part of the record in the Court of Appeals and has been filed in this Court. The letters "S. M." refer to this typewritten portion.

The District Attorney asked that the trial be put over until September 15th (S. M. 35). To this, counsel for Weiss objected. He asked that if the case went over, the continuance be until the November Term, pointing out that the District Attorney had been nominated for the office of Mayor and that the case would become "a football of a political situation in the County and City" (S. M. 40). Counsel stated to the Court that, in a shop near the Court House, large placards appeared advertising a newspaper and referring to the appearance therein of a life story of the District Attorney (S. M. 41); that tacked on telegraph poles throughout the City and on sides of trucks in large letters were references to a story identified with this very trial (S. M. 41). Mr. Talley, counsel for the petitioner Weiss, also presented (S. M. 53) to the Court a copy of the "New York Journal-American" of August 5, 1941, and called attention to a page which was headed

> "Bill O'Dwyer—Life Story of the Man Who Smashed Murder, Inc."

An application was then and there made by counsel that there be a severance as to Weiss (S. M. 24).* This motion was denied (S. M. 28).

The Trial Court continued the case until September 15, saying in a memorandum (R. 177):

> "The Court will grant the motion for a continuance of the trial until after Labor Day, but it cannot go over until after election as that would subordinate the trial to the exigencies of a political campaign, which is unthinkable. No prejudice can come from trying the case before election because sensibly no juror will be influenced by his political views in deciding the question of guilt or innocence in a capital case."

The hysterical utterings of the newspapers reached a climax in a series of articles published by the "Daily

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* Mr. Talley referred in his motion to the fact that the judge presiding at the trial was also a candidate for election (S. M. 42, 43).

Mirror" commencing August 25, 1941, and continuing through a part of the trial (R. 159).

We need refer only to the caption which prefaced the first of these series. It reads:

> "Murder Inc. Expires as Lepke Goes on Trial
>
> Today, Arthur Mefford presents the first instalment of a thrilling new series of true-fact articles divulging the behind-the-scene workings of 'Murder, Inc.', the Brooklyn killers—who murdered to order for rates as low as a dollar—and the crime-packed life story of the gang's boss Louis 'Lepke' Buchalter, who goes on trial for murder on Sept. 15. The murderous crew's deadly power has been broken by Brooklyn's crusading district attorney, William O'Dwyer, but the complete story of their machinations is revealed here for the first time in complete, authentic detail:"

It is not surprising that the impaneling of a jury was made difficult by such publications. Between the 15th of September and the 24th of that month, 24 veniremen were examined. Of them, 3 had been excused because of acquaintanceship with the District Attorney or his associates; one had said he would not accept accomplice testimony. Only one juror had been accepted as satisfactory to both sides. Of the remaining 19, 14 had derived some impression from reading the newspapers. Of these, 10 had formed an impression adverse to the defendants, and of these 10, 2 had formed an impression that they were guilty.*

Little wonder that the Court stated at the beginning of the afternoon session on September 24 (S. M. 614):

> "You are requested not to talk about the case. Let nobody talk to you about it. Please read nothing, especially The Mirror. Those Mirror articles which

* The remaining five veniremen were, for one reason or another, challenged peremptorily and the record is not clear as to any impressions they may have gained from the newspapers.

> are still being published seem to be raising havoc with the jurors in this case, and there is no way of the court stopping them under the law."

Eventually, after 135 prospective jurors had been examined, and after the defendants had exhausted their 30 peremptory challenges and the State 18, a jury was chosen. The fitness of the last two, chosen over the protest of the defendants, was doubtful. Of the jurors examined after the court's admonition on September 24, a large number either said that they had not read or that they had formed no impression from the newspaper articles.

We need not question the good faith of the jurors who served. Whether it was possible for them, in the midst of this maelstrom, to act calmly and deliberately is another question. With the howling of the sensational press in their ears to the point that the Judge was compelled to take notice of it at the trial, we say that justice required at least a calm, deliberate and dispassionate presentation of the case to neutralize the clamor in the community. The proceedings should, therefore, be viewed against the backdrop of their inception.

The tension and excitement which prevailed was heightened and sustained by the theatrical methods pursued at the trial. For the purpose of this petition, we believe it to be sufficient to refer to but one of a number of them. When the witness Bernstein was called to the stand on behalf of the People, he was preceded by a court attendant and was followed by three men known to be detectives (R. 686). Two of them had their badges on (R. 687). An objection by counsel for Buchalter elicited the statement by the prosecuting attorney (R. 687):

> "Mr. Turkus: Is the objection to the protection of the witness?"*

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* It should be borne in mind that the motive alleged for the killing of Rosen was that the victim threatened to inform on Buchalter.

Counsel for Capone asked for a mistrial because of the atmosphere created by having two police officers standing in an unusual position next to the jury box while the witness testified and having two court officers, one standing directly behind the witness and the other to his left. In this motion, the defendant Weiss joined (R. 687). The Court, in denying the motion for a mistrial, described the scene as follows (R. 688-689):

> "The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial."

Before commencing his cross-examination, counsel for petitioner Weiss asked for the removal of the court officer who stood within six inches behind the witness chair, and of the two detectives who, having escorted the witness to the chair, stood in sight of the jury (R. 764). He referred to the fact that there were numerous detectives in the courtroom and uniformed policemen outside (R. 765). Counsel also objected to the fact that the three defendants had been brought into the courtroom manacled to police officers and that they had been unmanacled only after the jury were in their seats and the defendants had been seated in the courtroom (R. 766-768). Although the Judge said that he would not permit defendants to be manacled when seated in the courtroom, he excused the procedure in bringing them there by saying (R. 767):

> "The Court: These defendants have been brought into this court-room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor, down a public staircase, and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say."

## The District Attorney's Assurances to the Jury

It was the case of the prosecution that the petitioner Weiss, together with one Harry Strauss, wielded the weapons which killed Joseph Rosen; that the defendant Buchalter had ordered the murder, and the defendant Capone had prescribed the route which an automobile was to follow and had aided the culprits in their escape.

No one saw Weiss and Strauss fire the shots which killed Rosen. No reputable person identified Weiss as the slayer.* According to the story, Weiss did not know Rosen. Consequently, the District Attorney presented an array of confessed criminals to prove his case. Two of them said they were participants in the murder. One, Bernstein, said he was the driver of the automobile in which Weiss had gone to Rosen's store and in which he escaped after the shooting (R. 741). The other, named Berger, said that on instructions from Buchalter he had gone with Weiss to Rosen's store on the night before the shooting so as to identify the victim (R. 1807). Rubin was a messenger whom Buchalter dispatched to summon Berger for his orders (R. 1367). Tannenbaum said he was present when Weiss reported the results of his mission to the defendant Buchalter (R. 2223). Tannenbaum also said that Weiss talked to him about the murder on a later occasion (R. 2226).

Bernstein, Berger and Tannenbaum were all, by their own confession on the stand, despicable characters, steeped in a life of crime. They had committed or participated in every variety of crime from thievery to perjury to murder. They had had the opportunity, during a long but comfortable detention in a hotel by the authorities, to concoct

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* Mrs. Rosen, the wife of the deceased, was called to identify petitioner Weiss as the man who had come into her store the night before the murder (R. 245, 259, 262). So far from credible was her testimony that it was stricken out at the end of the trial (R. 3533-3534).

a story damning the defendants for the purpose of saving their own miserable skins. If the stories testified to by Bernstein and Berger were true, they were equally guilty of the crime with which the petitioner was charged. The Trial Court instructed the jury that they were accomplices as a matter of law although they were not joined in the indictment. All of these witnesses had admitted their criminal exploits.

Obviously, the District Attorney recognized that the jury might wonder that neither Bernstein nor Berger had been indicted for the murder. This might raise a doubt in the minds of the jury whether they were telling the truth, or were buying absolution by choosing Weiss as the culprit to stand in their place, and satisfy the District Attorney's desire to reach Buchalter and Capone.

To a jury already conditioned against the defendants and inflamed against Weiss because of the veiled insinuation that he was a part of Murder, Incorporated, the District Attorney gave the following assurances (R. 3830):*

> "Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use common sense here."

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* Judge Lehman, referring to this statement (R. 4076; 289 N. Y. 229) said: "In those words there is implicit a promise which the prosecuting attorney could not properly or truthfully make that in due time the witnesses would receive their just deserts."

(The records of the County Court, as disclosed to the New York Court of Appeals in Weiss' brief, show that the witnesses Berger and Bernstein were later released. This fact raises doubt as to the good faith of the prosecutor.)

And at page 3821:

> "Whatever my lot in life may be, whether I go out of public office after this case or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way with any of you to make you feel that I had discredited you or myself, or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of a situation, I would like it. And that ends it."*

Again we observe that any one factor is merely an integral part of the pattern by which petitioner Weiss was deprived of a fair trial and of due process of law.

## The Trial Court's Instructions to the Jury

The taking of testimony commenced on October 20, 1941 (R. 226), and continued until November 25, 1941 (R. 352), a period of some five weeks. Counsel for the defendants addressed the jury for two days (R. 3543-3780). On Saturday, November 29, the District Attorney summed up to the jury the entire morning and part of the afternoon session (R. 3782-3860). The Court commenced its charge at 3:20 in the afternoon (R. 3871) and the jury retired for its deliberations at 10:15 that evening (R. 3992). Within four and a half hours, it brought in its verdict adjudging all three of the defendants guilty of murder in the first degree (R. 3993).

The instructions to the jury had provided the *coup de grace*. Rarely, we submit, has there been a charge to the jury so one-sided, so damaging, and so obviously a direction to convict.

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* Judge Loughran said: "A majority of this court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument may have unduly prejudiced the jury against the defendants" (R. 4086, 289 N. Y. 238).

We do not dwell upon errors of law or deficiencies in the charge which are beyond the scope of this Court's review. The instructions transcended mere error and deprived petitioner of due process when the Court withdrew from the jury matters solely within their province and when he crystallized only those elements of the case which were damaging to the petitioner. Considerations which might have tipped the scales in defendants' favor were minimized and ridiculed by the Court.*

(1) Weiss had tendered an alibi to the effect that on the night of September 12, a time when he was supposed to have been with Bernstein at the scene of the crime, he was actually attending a birthday party for his brother. Five witnesses testified to this and their testimony covers almost 400 pages of the Record (R. 3070-3454). Yet, the Court's charge was entirely silent on this alibi. Counsel for petitioner requested the Court "to instruct the jury that the defendant Weiss does not have the burden of proof as to the defense of alibi." He urged that if the alibi raised a reasonable doubt, the defendant was entitled to acquittal. The Court refused to charge as requested, and the instructions given were prefaced by the casual remark (R. 3949):

> "The Court: Oh, gentlemen, I knew there was something I forgot, and, really, I must apologize. This is in perfectly good faith. I think we are all so tired that I sort of faltered towards the end of the charge. Supposing I charge you as to alibi:"**

* Judge Loughran said (R. 4087; 289 N. Y. 181 at page 239): "As an inevitable consequence of these concepts of his function, the Judge's treatment of the proofs took the character of a summation for the People. We will not say such a charge was right."

** During the summation the Trial Judge said (R. 3773): "The charge has been prepared * * *."

The gist of charge then given is contained in the following language (R. 395): "Obviously, if the alibi is true, then he was not where it is claimed he was, but, if the alibi is untrue, it does not amount to anything."* The question of reasonable doubt was completely disregarded.

(2) A vital weakness in the People's case had been developed on cross examination. The witness Bernstein had testified that on Friday, September 11, he was sitting in his car, in Brooklyn, chatting with Harry Strauss when petitioner Weiss, the defendant Capone, and Cohen appeared upon the scene (R. 699). These three individuals then left, accompanied by Harry Strauss, and returned in about three-quarters of an hour. It was upon their return that Bernstein was instructed to steal an automobile which was the vehicle thereafter used in the murder (R. 4042).

Rubin testified that on the same day he had a conversation with the defendant Buchalter, at the latter's office, 200 Fifth Ave., N. Y., and that Buchalter complained about Rosen's talking. Rubin volunteered to see one Weinstein for the purpose of persuading Rosen to be silent; that he later returned, told Buchalter that nothing could be accomplished, whereupon he was dispatched to summon Berger (R. 1366).

Berger testified that Rubin transmitted the summons, whereupon he, Berger, went to see Buchalter at his office

* The accuracy of the instructions, when given, were a matter of dispute in the Court of Appeals. Judge Conway said: "As to the defendant Weiss, his defense in substance was an alibi. The court properly charged as to that defense" (R. 4058; 289 N. Y. 181 at page 210).

Judge Rippey said: "I agree with all that Judge Loughran has said concerning the errors committed during the progress of the trial, that such errors were prejudicial and cannot be overlooked. Reference might have been made to other errors. Among those was the charge substantially to the effect that the burden rested upon Weiss to establish his innocence on the basis of his alibi defense" (R. 4090; 289 N. Y. 181 at page 242).

at 200 Fifth Avenue. From there, Buchalter took Rubin to the East Side of New York where they met petitioner Weiss and where the instructions were given that Berger point Rosen out to Weiss. It was in consequence of these instructions that Berger took Weiss to Rosen's store and identified him (R. 1807, 1811).

The obvious inference from the testimony given on direct examination is that the events followed in sequence, that when Buchalter discovered that nothing could be done to silence Rosen, he determined to have him killed and thereupon set the wheels in motion towards that end.

On cross-examination, however, the witnesses enmeshed themselves in a tissue of inconsistencies, and what is later referred to as a "time table" became significant.

Bernstein said that his meeting with the petitioner Weiss and the others took place about one o'clock in the afternoon (R. 872). Three-quarters of an hour later, he was instructed to steal the automobile (R. 901). This was at least an hour before Rubin had made his report to Buchalter. Rubin's testimony is that he saw Buchalter about one o'clock (R. 1646) and it was about two hours later that he returned from the conference with Weinstein and that Buchalter told him to fetch Berger (R. 1660). This discrepancy was further emphasized when Berger testified that it was about five o'clock when Rubin called upon him (R. 1944). It was after that time that Berger went with Buchalter to the East Side and discussed the identification with Weiss (R. 1945, 1961, 1962, 1964).

When, where and how was the crime planned? Was it before the one o'clock meeting between Bernstein and petitioner in Brooklyn? Was it planned even before Buchalter, the alleged instigator, had spoken to Rubin in the office at 200 Fifth Avenue, New York? Or was the crime determined upon only after three o'clock, when Rubin returned

and reported to Buchalter that Weinstein could do nothing to stop Rosen's talking?

Upon argument to the jury, counsel for Weiss obviously drew blood when he hit at this vulnerable spot (R. 3680-3681). The District Attorney countered by suggesting that (R. 3828):

> "Preliminary details could be—someone could be sent to Brownsville and arrange for the car before the actual 'fingering'. What flaw in the People's case is that? What kind of logic is that? You could even do that on the 'phone, and say, 'Get a car right away'."

Here, then was an obvious question for the jury. Did the time table stand up, or did it fall? The Trial Court, however, withdrew this question from the jury. He said (R. 3906-3907):

> "In view of the fact that this was particularly discussed in reference to hour of the day, and it was argued by one of the counsel that inasmuch as the pointing out was at night, after dark, and the testimony by Bernstein as to the theft of the car and the hiring of the drop was during several hours of the day which preceded the pointing out, that that proved that the testimony did not hitch.
>
> "Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day.
>
> "Taken in connection with the other facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit.

"Apparently, in the argument that was offered, counsel assumed that Buchalter waited until after the fingering before he gave the instruction; but, under the record, I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. I don't say you have a right to draw an inference that he sent such an instruction over the telephone, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up, if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled."

During the taking of the exceptions (the jury had been excused by the Court), it was pointed out to the Judge that according to the testimony the time of the original conversation between Buchalter and Rubin had been fixed at one o'clock (R. 3976).

When the jury was recalled, the Court said (R. 3989-3990):

"I charged, in reference to the time table on Friday before the Rosen alleged murder, that I did not recall any specific hour mentioned in the record unless it was in the cross-examination somewhere, as to Rubin testifying just when he called and found Buchalter in such a state in making these declarations that he alleges Buchalter made. My attention has been called to page 1483 of the cross-examination, in which the time is fixed as follows: 'Sometime about one o'clock, I imagine, in the afternoon.'

My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brooklyn to go ahead with

the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—*and I think this is accurate and will hold and will not be error*—that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails. *I am not afraid of that charge.* There is an exception to all of the defendants on this modification."* (Italics ours.)

This is but an illustration of the devastating effect of the Court's instructions. Matters which were adduced in vague terms upon direct examination were crystallized and made specific on cross examination. Yet, the Trial Judge, in instructing the jury, reversed the process. He said (R. 3903):

> "Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss; it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute.

* As to this, Judge Loughran said:

"Thus the last word of the judge withdrew from the jury a vital issue of fact and disposed of it in favor of the People as matter of law. This was obvious error" (R. 4080; 289 N. Y. 181 at page 233).

> "**Unless there be an outstanding point come out on cross-examination, the Court would only ten' to confuse and mislead the jury if it attempted to discuss it.**"

(3) This disparagement of cross-examination and the attempt of the Trial Court to bolster the credibility of the People's witnesses permeates the entire charge. Referring to impeachment by reference to testimony given before the Grand Jury, the Court said (R. 3899-3900):

> "Something else was said in regard to an alleged failure of some witness to tell something to the Grand Jury that the witness testified to here, but, gentlemen, the Grand Jury is not a trial body. It may take only ten minutes to get enough evidence to get an indictment, but it may take ten weeks to get all of the evidence before a trial jury and get a decision as to the guilt or innocence of the accused. The failure to state facts concerning which the witness is not asked before the Grand Jury means nothing whatever. You will just disregard it. The only reason you are permitted to hear a witness cross-examined in regard to Grand Jury minutes is where he testified before the Grand Jury in contradiction of something that he testified to here. Bear that in mind. Don't be misled by that argument."*

* One might compare this instruction, for example, with the testimony of Bernstein on cross-examination (R. 1266-1267):

> "Q. You testified that on both occasions, the night before and the morning of the killing, that *Weiss distributed* the guns? A. Yes, sir.
>
> "Q. That was true, wasn't it? A. Yes, sir.
>
> "Q. Now were you asked these questions in your testimony before the Grand Jury and did you make these answers: * * *
>
> "Q. What did you do with the guns when you opened the package? A. *Harry* opened the package and gave Mendy a gun, Jimmy a gun, and he took one himself.'
>
> "Were you asked those questions and did you make those answers? A. Yes, sir.
>
> "Q. And the Harry that you referred to in your testimony was *not* Weiss; it was *Harry Strauss*, wasn't it? A. It is a mistake, sir."

(*Note continued on following page*)

One witness, Magoon, had brazenly asserted on cross-examination that never in his life had he told anything but "little white lies" (R. 2514). However, the jury were not permitted to consider this obvious exaggeration in its bearing upon the witness' credibility. The Court admonished the jury (R. 3898-3899):

> "Now, I want to take up a little matter with you. I heard it in the summation of one of the counsel, and I feel that I really should see that none of you is misled by it. Much was said about a foolish remark —it might better be characterized as a fool remark— by one of the witnesses to the effect that he had never told an important lie. I would not specifically allude to this if so much had not been made of it in the argument. I charge you not to let the decision of so important a case as this turn on a question of mockery or ridicule. I mean your reaction to mockery or ridicule, of a specific witness for a stupid answer such as that. This case is too important to be decided on the basis of ridicule."

Another example relates to the impeachment of witnesses when they were confronted with prior statements. A stock answer seems to have been along the line:

> "If it is in the book, it is so" (R. 3894). "If it is in there, I said it". (see R. 2334, 2335.)

The Court instructed the jury (R. 3894):

> "The usual method is to say, 'On such and such an occasion were you asked the following question

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(*Note continued from preceding page*)

There should also be considered, in connection with this charge, the testimony of Tannenbaum during which the following appears from the cross examination (R. 2345):

> "Q. Didn't you testify before the Federal Grand Jury that you only knew Mendy Weiss slightly? A. Yes, sir.
> "Q. That was false, you say now? A. Yes, sir.
> "Q. That was a deliberate false statement you made to the Federal Grand Jury? A. It was."

> and did you give the following answer?' Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, *but to put a burden upon him of remembering the exact text of question and answer is an unholy thing.* We have a court reporter here to supply daily minutes in this case because counsel forget over night the questions and answers in text form of the day before; but, you see, when a witness is asked, 'Answer yes or no,' about something that he testified to a long time before, *you get a normal response* sometimes, 'If it is in the book, it is so.' There is a concession of the accuracy of the minutes the witness is not disputing. I am just calling your attention to it. That is a matter of application of sound common sense." (Italics ours.)

(4) The excitement to which we have referred as coloring the atmosphere of the trial even crept into the Court's charge and colored not only his thinking but his instructions to the jury.

In the examination of Bernstein, the *prosecuting attorney* had elicited on direct examination that the witness had been confined since the time of his surrender to a detective in a hotel. He and others were in a separate suite to which access could be had "only through certain methods" (R. 762). The doors were barricaded and there were detectives present armed with machine guns and shot guns. There was an arrangement of mirrors so that the detectives could see people coming through the corridor and there was a peephole in the door (R. 762-763). Objections were made to this testimony and exceptions taken by the defendants (R. 762-763). (Berger was also placed in custody in a hotel, R. 1877, as was Tannenbaum, R. 2231.) The housing of witnesses was the subject of comment by counsel for the defendants in their addresses to the jury. The Court, in its instructions to the jury, said (R. 3900-3901):

> "There has been considerable confusion in the argument, so far as your receptivities are concerned

mentally, on the question of the housing of witnesses. Gentlemen, I charge you the District Attorney does not house those witnesses. The District Attorney has not charge of those witnesses. Those witnesses are in custody under a court order, which the jury may not question, because you don't know the reason why that order was made in each case, *and I would not dare to tell you; I would not be allowed to tell you.* Sufficient unto the judgment of the Court which had the facts before it, such orders were made because the Court deemed it, to be a case where the witnesses should not be kept in the House of Detention or in prison. I am not permitted to tell you the reasons. They were not guests of any hotel, as alluded to by the summation. Don't fool yourselves on that. They could not come and go; they could not mingle with anybody; they could not go out to take a walk. They were prisoners, held under rigid guard. All of this argument about their having eaten fare provided by the hotel instead of fare sent up from Raymond Street Jail will be disregarded. They were held prisoners in the hotel, and, of course, they had to get their food in the hotel, in their rooms." (Italics ours.)

After exception was taken to this portion of the charge by counsel for Weiss (R. 3980) in the absence of the jury, the Court, when the jury was recalled, said (R. 3991):

"On Weiss, my attention is called to the fact I used the word 'dare' in connection with 'I would not dare to state to you the reason the Court had for housing witnesses in hotels.' The word 'dare' was not intended to mean that I was afraid, or that there was anything about it of such an appalling nature that you should feel it was something that would make you shudder if it was revealed. The word 'dare' means that, under the rules of evidence, if I dared to tell you that, *I believe it would be regarded or might be regarded by an appellate tribunal, in the contingent event of this case having to come up for review, as reversible error. To*

*avoid that, I withdraw the word 'dare.'"** (Italics ours.)

Any doubt of the emotional reaction of the Court as communicated to the jury is dissipated by his statement in excusing the necessity of the prosecutor's production of unsavory witnesses. He said (R. 3903-3904):

> "When rogues fall out, it is a wise man's delight; so, while the Court submits to you consideration of the testimony of witnesses who, by their own admissions and otherwise are impeached as professional criminals, murderers, thieves, perjurers, in the long run it comes down to this: Are they telling the truth now?"

Again an exception was taken in the absence of the jury (R. 3974). This obviously damaging expression was not cured by the Court's statement when the jury was recalled (R. 3989):

> "At one place during the charge I quoted an old saw, 'When rogues fall out, wise men delight'. That was intended to have general application. It was not intended as calling the defendant names, but, lest it be misunderstood as having specific application to the de-

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* We need not speculate on the influence which caused the Court to make his earlier remarks. He said, in the absence of the jury (R. 3973-3974):

> "The Court: I could not possibly tell the jury the real reason, but the danger of assassination is the reason, as is well known. There would be no trial here had those witnesses been kept in the jail. So far as Bronx County Jail is concerned, that is a Bronx County matter, not subject to order here, and that is a thoroughly modern jail. There is no comparison between that and the Raymond Street Jail or the old Tombs where these witnesses had to be kept had they not been housed in hotels. An experience in another case shows it would be utter folly to send any material witness to Queens County Jail because of what happened in the Maione-Abbandando case, involving the bribery of the lone jailer at night."

> fendants as rogues, the Court withdraws and apologizes for it. It was not so meant. Just disregard it.'"*

Petitioner does not controvert the fact that the Trial Judge did recite, in some instances correctly, in others erroneously, those standard rules of law which are required in a criminal case. He told the jury that the burden lay on the People to prove its case beyond a reasonable doubt (R. 3929-3930; 3883); that no inference could be drawn from the failure on the part of the defendants to take the stand (R. 3927); and that the jury were the judges of the credibility of the witnesses (R. 3903). In their setting, however, these statements were mere platitudes and shibboleths which the jury could well infer were only for the purpose of the record and should not interfere with what they were actually instructed to find.

Petitioner urges, as a majority of the Court below found, that these were grievous errors which were not objectionable merely as infringement upon the law or deficiencies in practice. The tenor of the instructions and the statements made therein, your petitioner urges, resulted in a withdrawal of the case from the jury and in the direction of a verdict of guilt.

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* The majority of the Court of Appeals merely quote this in answer to the contention that the "rogues" epigram charge was error (R. 4030; 289 N. Y. 181). But Judges Loughran, Desmond and Rippey wrote (R. 4086; 289 N. Y. 238):

> "Although the jury were brought back from their deliberations and advised to disregard the epigram last quoted from the charge, we are still left with the vexed question whether the belated admonition of the court sufficed to remove the obvious intimation which was conveyed to the jury by so pithy a dictum from the bench. (Cf. *People* v. *Robinson*, 273 N. Y. 438.)"

It has well been said: "When an idea once gets into a juror's mind, nothing on earth will get it out again."

## The Denial to Petitioner of Access to Information Available to the Prosecutor

An essential link in the People's case was anchored upon the instructions alleged to have been given by the defendant Buchalter that Berger identify Rosen for Weiss. The claim is that on September 11, 1936, Berger, in response to a summons conveyed by Rubin, visited Buchalter's office at 200 Fifth Avenue, New York City (R. 1804, 1945); that Buchalter and Berger then left this building together at about five o'clock in the afternoon (R. 1805, 1960), proceeding to the East Side where they conferred with Weiss (R. 1806-1807, 1961-1964).

It appears that during the period in question Buchalter was under surveillance by representatives of the New York Police Department. The defendants had subpoenaed the records of the Police Department, which were brought to Court and apparently turned over to the prosecuting attorney (R. 1880-1883, 2140-2141). Defendants' request that they be permitted to examine these reports was refused (R. 2148-2154). The reports were thereupon sealed and marked as an exhibit for identification (R. 2155). What these reports disclose, petitioner has no way of knowing.

On the application for reargument to the Court of Appeals, that Court examined these reports. A fair inference from its opinion (R. 4120) is that the surveillance by the police officials was a fact. The Court expressed the opinion that the information disclosed by the reports was inconclusive because only the lobby of the building at 200 Fifth Avenue was under observation and the defendant Buchalter could have and did on occasion evade the observers.

Yet Berger's testimony, if not a larger portion of the People's case, may well have been subject to impeachment by the results even of this limited surveillance. Upon cross-examination the witness revealed

that when he and Buchalter left 200 Fifth Avenue on September 11, they walked out of the front entrance of that building (R. 1960). They crossed the street and hailed a taxicab which was passing by. Buchalter was not in disguise (R. 1959).

The information contained in the police reports, therefore, might have had probative value from one of two aspects. If the report disclosed that at about five o'clock on September 11, 1936, Buchalter was at a place other than 200 Fifth Avenue, then clearly Berger's story would be false. This would amount to affirmative contradiction.

If, on the other hand, the reports revealed that detectives were actually stationed at the entrance to 200 Fifth Avenue, and that Buchalter did not emerge from that entrance accompanied by another person, the evidence, while negative, might well have probative force in impeaching Berger's testimony.

In either aspect, we submit, the defendant should have had access to these reports, the contents of which were known to the District Attorney.

These reports might well have controverted or at least cast doubt upon Tannenbaum's story that some three or four days after September 11, Weiss visited Buchalter and "confessed" the shooting, and that he made the same "confession" when the witness and Weiss went from Buchalter's office to a restaurant (R. 2223, 2224 2225).

This question of surveillance was argued to the jury on summation by defendant Buchalter's counsel (R. 3589-3593). The attorney for the People answered (R. 3828):

> "Somebody says Dewey's detectives and police surrounded the whole place. If there had been that kind of surveillance of Lepke, they would have caught him—I don't mean that—I mean the law enforcement would have caught them red-handed, the whole bunch of them."

Thus, the defendants and the jury were obliged to speculate, whereas the District Attorney *knew*, or was in a position to know what the reports revealed. Fairness demanded that even if the entirety of the report could not be revealed to counsel, those portions of the report directly pertinent to the trial should have been made available to the defendants.

## The Trial Judge's Constant Interference with Presentation of Defenses, His Numerous Rebukes and Repressions of Defendants' Counsel, Preventing Adequate Defense

This point, addressed to the essential unfairness of the whole trial in respect of all the defendants, was presented to the Trial Court as follows (R. 2602-2603):

> "* * * At this time I move for the withdrawal of a juror and the declaration of a mistrial.
>
> "The Court: On what ground?
>
> "Mr. Rosenthal: Upon the ground that the action of the Court toward defense counsel and upon the observations of this Court throughout this trial as to the testimony of various witnesses and what the import of their testimony is throughout the trial, being an invasion of the jury's province.
>
> "The Court: Gentlemen of the jury, disregard that.
>
> "These are just tactics trying to set the jury against the Court, thereby lessening the authority of the Court with the jury—giving the Court instructions.
>
> "Mr. Rosenthal: I except to that observation.
>
> "The Court: The motion is denied.
>
> "Defense Counsel: All except."

Because the number of these interferences by the Trial Judge is a main factor here—showing studied and systematic disparagement of the defense—it is impossible, within the limits of necessary brevity, to do more than cite salient examples.

Twice, for example, the Court came to the rescue of the People's witnesses by endeavoring to excuse flagrant perjury (R. 2358, 1712). People's witness Tannenbaum had been forced to admit that he had signed and sworn to a false affidavit when charged with murder in Sullivan County, New York (R. 2323-2330). The Trial Judge thereupon interposed a question suggesting that this was justifiable perjury. This is shown by the following excerpt from Tannenbaum's re-direct examination (R. 2358):

> "Q. (By the district attorney) At any rate, at the time you entered the plea of not guilty and signed Defendants' Exhibit 2, you were then a defendant resisting conviction on the indictment therein alleged, namely, the killing of one Irving Ashkenas, is that right? A. Yes.
>
> "The Court: You were then fighting to save your own life, is that it?
>
> "The Witness: Yes, sir."

On other occasions, the Trial Judge made repeated efforts to save the People's witnesses from damaging admissions which would militate against their credibility. A striking illustration appears during the cross-examination of the witness Bernstein, when defense counsel inquired into his knowledge that an automobile stolen by him was to be used in connection with the murder. He was asked *by the Court* (R. 1181):

> "Q. Then the impression was, if the car was found, it was stolen for the purpose of stripping? A. Yes, sir.
>
> "Q. And not for the purpose of committing any other crime? A. Yes, sir."

Defense counsel then inquired (R. 1181):

> "Q. What were you trying to conceal, if the car was found, so as to make it look as if it was only for stripping and not for any other purpose?"

Thereupon the Court prevented a response by interrupting and asking (R. 1182):

> "Q. (Interrupting) Just answer the next question yes or no—Did you have a suspicion as to what Strauss wanted the car for?"

Counsel objected, stating (R. 1182):

> "Mr. Rosenthal: I object.
> "The Court: The objection is sustained. I thought you wanted that evidence.
> "Mr. Rosenthal: I don't want words put in the witness' mouth. I wanted him to tell me, not have your Honor ask him a question which would call for yes or no—I want him to tell the jury the reason. I don't want the reason furnished.
> "Mr. Turkus: I object to that.
> "The Court: It does not penetrate the Court's skin. Go ahead."

After some sparring without any responsive answer by the witness, the Court again intervened (R. 1184):

> "By the Court:
> "Q. Was that the reason? A. I did not know there was to be a murder or I would never have him take out the radio of the car."

So at last the witness answered the unanswered question in the way the Judge intended it should be answered.

On the vitally important issue of the "time table", almost invariably the Judge gratuitously protected and bolstered the People's witnesses adversely to petitioner (R. 1974-1975, 1972-1973, 1964, 1658, 2173, 2179). For instance, during the cross-examination of the People's witness Berger by Mr. Barshay, the following occurred (R. 1974-1975):

> "Q. And the best time you can give us is 9:30? A. Between 9:30 and 10. I left that place 9:30, to the best of my recollection.
>
> . . . . . .

"Q. How much time did you spend in Brownsville near the vicinity of Sackman and Livonia, Saratoga and Livonia, and Rosen's candy store, all together?

"Mr. Turkus: I object to it as already answered to the best of his recollection.

"The Court: His testimony shows it is all guesswork.

"Mr. Barshay: He has fixed himself the time as between 9:30 and 10.

"The Court: Pardon me, he has not fixed the time. The Court won't discuss that.

"Q. Mr. Witness, did you say between 9:30 and 10?

"The Court: *I know what he said, but the Court knows it means nothing.*

"Mr. Barshay: I take an exception to the Court's remarks.

"The Court: Now proceed.

"Mr. Barshay: And I ask for the withdrawal of a juror and the declaration of a mistrial.

"The Court: On what ground?

"Mr. Barshay: On the ground of prejudice, when the Court said that does not mean anything.

"The Court: You mean to have a withdrawal of a juror because the Court will not agree with you that guessing as to time is accurate?

"Mr. Barshay: No, sir, that is not my point.

"The Court: I think it is. Denied.

"Mr. Barshay: Exception, sir."

The Judge constantly accused defendants' counsel of "manufacturing a record" (R. 3870, 3867), of attempting to make a "padded record" (R. 3865), and of being "disorderly" (R. 3869, 3868). One of many examples of this sort of thing, is the following statement of the Court to one of petitioner's counsel, Judge Talley (R. 2170-2171):

> "The Court: You are distinctly rude and uncivil. The Court refuses to be goaded to the extent that you are obviously trying to goad the Court at this or any other time. The Court will be patient to the utmost and take it on both cheeks from counsel. Now please proceed."

In many instances, the moment counsel so much as attempted to state a ground for any objection, the Judge rebuked them with repeated statements beginning with the words "do not argue" (R. 1281, 1524-1525, 2744, 3049-3050, 3054). A sample of this, from R. 3866, is this animadversion:

> "The Court: Do not argue. This is all out of order. It has never been done in any trial before. I have indulged you to the utmost throughout this trial, and that is the only reason I am allowing you to do it."

During cross-examination of the People's witnesses, if any matter had been so little as barely touched on previously in the cross-examination, the Trial Judge sustained objection to any repetition whatsoever of such matter* (R. 2405, 2065, 1653, 2064, 295, 300, 302, 665, 675, 676-677, 877, 922, 1055, 1082, 1136, 1173, 1176, 1886, 1490, 1212, 1226, 1231, 1510, 1513, 2303).

Others of the more important instances, of various types, akin to the foregoing, are to be found on record pages 2073-2075, 2135-2138, 2170-2171, 2951-2952, 2955, 3229-3230.

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* Regarding this, Judges Loughran and Desmond said in the Court of Appeals (R. 4084-4085; 289 N. Y. 237):

> "We think these exceptions are not without merit. Mr. Wigmore says: 'Repeating precisely the *same allocable question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, *after an original false answer* or *refusal to answer*, is a process which not only savors of intimidation and browbeating but also tends to waste time. Nevertheless, when used sparingly and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference. * * * Simple as the expedient seems, it rests on a sound psychology; and the annals of our trials demonstrate its power.' (3 Wigmore on Evidence (3d ed.) § 782, p. 146. See, also, 1 Chamberlayne, The Modern Law of Evidence, § 553.)"

2967-2968, 3025-3026, 1883, 654-659, 1209, 2066, 2503, 2131, 1273, 1511, 1512, 1187-1188, 1113-1114. These are only a few of the whole number of like instances which may be noted in reading the record.

*People* v. *Becker*, 210 N. Y. 274, 311, 289-312, remarkably resembles the case at bar and is strikingly apposite.

## Grounds Upon Which the Jurisdiction of this Court is Invoked

It is respectfully submitted that this Court has jurisdiction of this petition for certiorari under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1 (43 Stat. 937); 28 U. S. C. A. Section 344(b), such petition being one to review the final judgment of the Court of Appeals of the State of New York, the highest Court of that State in which a decision could be had, rendered October 30, 1942 (R. 4094-4097).

The judgment affirmed a conviction and judgment for sentence of death (R. 218-221); and in said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Amendment of the Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his life and liberty without due process of law "and", as certified by the Court of Appeals, "this point was considered and necessarily decided by this Court" (R. 4095), this point having been specifically presented in Buchalter's brief in support of his motion for reargument (R. 4103-4114), which was joined in by petitioner Weiss (R. 4120).

## Reasons Relied Upon for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, in that the Court of Appeals of the State of New York has affirmed a judgment and sentence of death wherein, tested by an appraisal of the totality of the facts in this case (*Betts* v. *Brady*, June 1, 1942, 316 U. S. 455, 462), the petitioner was deprived of his life and liberty without due process of law.

See:

*Mooney* v. *Holohan* (1935), 294 U. S. 103, 112-113;
*Powell* v. *Alabama* (1932), 287 U. S. 45, 57-73;
*Moore* v. *Dempsey* (1923), 261 U. S. 86, 90-91;
*Hysler* v. *Florida* (1942), 315 U. S. 411, 413;
*Hill* v. *Texas* (June 1, 1942), 316 U. S. 400, 406;
*Brown* v. *Mississippi* (1936), 297 U. S. 278, 286;
*Chambers* v. *Florida* (1940), 309 U. S. 227, 236-241;
*Frank* v. *Mangum* (1915), 237 U. S. 309, 335-336;
*Lisenba* v. *California* (December, 1941), 314 U. S. 219, 236-237;
*Ward* v. *Texas* (June 1, 1942), 316 U. S. 547, 550.

WHEREFORE, petitioner Weiss prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the Court of Appeals of the State of New York affirm-

ing the judgment in this cause may be reversed and that the petitioner Weiss may have such other and further relief in the premises as this Court may deem proper.

Dated, December 31st, 1942.

EMANUEL WEISS,
Petitioner.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

ALFRED J. TALLEY,
JOHN SCHULMAN,
M. M. KREINDLER,
HARRY G. ANDERSON,
SAMUEL BADER,
GERALD WEATHERLY,
of Counsel.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

# Supreme Court of the United States

OCTOBER TERM—1942

EMANUEL WEISS,

Petitioner,

*against*

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### The Opinions Below

The four opinions of the Court of Appeals of the State of New York are printed in the record (R. 4030-4091) and are officially reported in the weekly advance sheets No. 189, December 12, 1942, 289 N. Y. 181. The opinion *per curiam* of the Court of Appeals denying the motion for reargument has not as yet been officially reported, but appears in the record (R. 4120-4121).

### Statement of Jurisdiction, Questions Presented, and Facts

The statement under which the jurisdiction of this Court is invoked, of the questions presented, and of the factual matter relevant to this application, appear in the petition to which this brief is annexed.

## Argument

Petitioner urges that he has been convicted for the crime of murder and has been sentenced to death as a result of a trial so grossly unfair that he was denied due process of law.

The basis of his plea may be stated in the language employed by this Court in *Brown* v. *Mississippi*, 297 U. S. 278, 286:

> "The complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial. * * *"

## POINT I

### The petitioner was deprived of his liberty and life without due process of law by a proceeding which was a trial only in form and not in substance.

This Court has recently said that the guarantee of due process is not formulated in a set of hard and fast rules, but that "Asserted denial is to be tested by an appraisal of the totality of facts in a given case" (*Betts* v. *Brady*, 316 U. S. 455, 462).

Basic criteria are whether there has been "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" (*Chambers* v. *Florida*, 309 U. S. 227, 236-237) and whether "civilized standards for the trial of guilt or innocence" have been observed (*Hysler* v. *Florida*, 315 U. S. 411, 413).

> "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."
>
> "The law * * * is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 105, 122).

There is no due process within the meaning of the constitutional guarantees "if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong" (*Moore* v. *Dempsey*, 261 U. S. 86, 91).

If the absence of fairness so fatally infects a trial as to constitute a deprivation of due process, then it lies within the jurisdiction of this Court to reverse the action of the State Court (*Hill* v. *Texas*, 316 U. S. 400)—this for the purpose of translating into living law and maintaining the constitutional shield for the benefit of every human being subject to our Constitution (*Chambers* v. *Florida*, 309 U. S. 227, 241). This protection extends to all persons, regardless of belief in their guilt or innocence, since "Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous" (*Hill* v. *Texas*, 316 U. S. 400, 406). The vitality of our system of law meets its test when challenged by an individual who may lack the Court's sympathy.

Petitioner Weiss was, under the Constitution and Laws of the State of New York, entitled to a trial by jury (Constitution of the State of New York, Article 1, Section 1, Appendix A). It was a privilege he could not waive even by his own affirmative act (Constitution of the State of New York, Article 1, Section 2, Appendix B; *Cancemi* v. *People*, 18 N. Y. 128).

In New York State, a person indicted for murder may not plead guilty and may not be condemned to death except after trial before a jury (*People* v. *La Barbera*, 274 N. Y. 339, 343).

By the statutes of the State, guilt at the trial must be established beyond a reasonable doubt and all questions of fact lie within the province of the jury (Code

of Criminal Procedure of the State of New York, Section 389, Appendix H; Penal Law of the State of New York, Section 1041, Appendix C; Code of Criminal Procedure of the State of New York, Section 419, Appendix D).

The New York Court of Appeals has held that:

> "Both by statute and common law, they" (the jury) "are the exclusive judges of all questions of fact and every essential element of a crime presents a question of fact, whether there is any conflict in the evidence or not" (*People* v. *Walker*, 198 N. Y. 329, 334).
>
> *People* v. *Pignataro*, 263 N. Y. 229, 240.

In *Smith* v. *Western Pacific Ry. Co.*, 203 N. Y. 499, a civil case, the Court said (p. 503):

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

Despite these standards of fairness recognized by the State of New York, the record in this case discloses a conviction and death sentence resulting from a trial which disregarded the fundamental guarantees which underlie a jury trial. The Chief Judge, who, with obvious misgivings, cast the deciding vote for affirmance, said in most explicit terms that (R. 4077-4078; 289 N. Y. 181):

> "* * * the Court in the charge instructed the jury as a matter of law upon some questions of fact which only the jury had the right to determine, and I may **add parenthetically that** I doubt whether I would agree with the inferences drawn by the Trial Judge even if he had been the trier of the facts."

The very concept of trial by jury presupposes that there will be a presentation of issues of fact to that body and that the defendant will be judged only on the evidence

presented in accordance with law, free from passion, prejudice, excitement, and tyrannical power (*Chambers v. Florida*, 309 U. S. 227, 237).

The record in the case at bar cannot be squared with principles of due process as pronounced by this Court. It discloses that the proceedings were dominated by passion, prejudice and public excitement. Before the trial commenced and during its continuance, newspaper articles had poisoned the public mind against the defendants and had virtually convicted them without trial. Because Weiss was jointly indicted with the defendant Buchalter, he was tried not for the crime charged but indirectly upon an accusation that he was a member of "Murder, Inc." In the public mind, anyone accused with Buchalter was presumptively a member of that gruesome crew.

This public hysteria invaded the courtroom itself. The Trial Judge was perforce obliged to take cognizance of it in impaneling the jury. The articles appearing in the press, and particularly in the Daily Mirror, were, he said, "raising havoc with the jurors in this case." Men called for duty in a special "blue ribbon" panel had prejudged the defendants before a single witness had been called.

Public clamor was more than ever aroused when the District Attorney, whose assistants were prosecuting the case, became a candidate for public office. He was acclaimed as the nemesis of Murder Inc. The prosecution of the defendants had become, as counsel for Weiss protested, "a football of a political situation".

One may conjecture that with careful observance of decorum, restraint and impartiality at the trial, the crushing effect of this hostile atmosphere might have been to some extent allayed. Yet, we find the trial attended by theatrical effects which increased instead of subduing the tension. The defendants were brought into the courtroom manacled to police officers, the process of

removing these manacles took place within sight of the jury; witnesses called by the People were attended by armed guards, giving the implication that this was necessary for the witnesses' protection.*

The prosecuting attorney added fuel to the flames when he assured the jury that the unsavory characters called on behalf of the prosecution would meet their just deserts after they had served their purpose. Even the Trial Judge was not immune to the excitement which had been created, and his emotional reaction to the case was communicated to the jury. It would have been a strong-minded jury, indeed, which could have resisted the hostility thus engendered.

In this setting, it is impossible to say that the petitioner Weiss had the fair trial to which he is entitled as a matter of fundamental law.

Weiss, it is true, was represented in Court by counsel of his own choosing. His lawyers might as well not have been there. Efforts to preserve his rights were frustrated by the Trial Judge. Arguments made by his counsel in summation, based on the evidence adduced, were belittled, derided and disparaged. The jury were virtually told to disregard them.

The language of the Court of Appeals in *People* v. *Becker*, 210 N. Y. 274, 311, is singularly appropriate in this case:

> "Under the rulings of the court the defendant did not have that manner of trial which the law guaranteed to him. His counsel was hampered and embarrassed; his case was discredited and weakened; full and impartial consideration by the jury was impeded and prevented. He never had a fair chance to defend his life and it would be a lasting reproach to the state if under those circumstances it should exact its forfeiture."

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* This suggestion was made explicit by the prosecutor (see petition page 11).

Reference has been made in the petition to the disparagement of cross-examination both while testimony was being adduced and in the charge. An important purpose of assuring to a defendant charged with crime the right to be represented by counsel is to enable him to subject his accusers to cross-examination by persons skilled in that art.

In *People* v. *Becker*, 210 N. Y. 274, the Court quoted from Wigmore on Evidence (2 Wigmore on Evidence, § 1367) the principle (p. 305) that:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

It was held that the deprivation of the right to cross-examine witnesses is a denial of a substantial right. What does it avail a defendant in a criminal case to have counsel, if that counsel's usefulness and function is destroyed by the Court?

The travesty in the proceedings reached its climax when the Trial Judge instructed the jury. Again and again he determined questions of fact for the jury and instructed them in respect of these issues as though they were questions of law. This is not a problem of mere "error" or one of the latitude to be afforded a Trial Judge in his charge to the jury. It was a perversion of the function of a Judge presiding at a criminal trial. Notwithstanding the latitude allowed Judges in many jurisdictions to comment upon evidence, it is a universal and fundamental rule under our system of law that the instructions must be fair, impartial and unbiased.

This Court, in *Hickory* v. *United States*, 160 U. S. 408, 423, repeated what it considered to be the well founded rule that:

> "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided."

In *Minner* v. *United States*, 57 Fed. (2d) 506, the Court, in commenting upon the rule that a judge need not be a mere automatic oracle of the law, but a living participant in the trial, said (p. 513):

> "But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."

Judge Kenyon, writing for a unanimous court reversing the conviction in *Weare* v. *United States*, 1 F. 2d 617 (cited with approval in *People* v. *Ohanian*, 245 N. Y. 227, 232), said at page 619:

> "The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinion of

> the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts,* but he is precluded from giving a one sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment."

A similar statement appears in *People* v. *Becker*, 210 N. Y. 274, 307-308.

In this connection, we recall to the Court that portion of the petition which refers to the failure of the Trial Judge to mention Weiss' alibi in the body of his instructions. Whether the charge subsequently given by him at the request of counsel was or was not correct as a matter of law is immaterial for the present purposes. Of importance is the fact that a vital and material part of Weiss' defense was treated so casually (*Cf. Powell* v. *Alabama*, 287 U. S. 45, 56).

Again we mention only briefly the failure on the part of the prosecuting attorney and the Trial Judge to make available to the defendants on trial for their lives, Police Department reports which might have had a bearing upon the trial of the People's case. It is obviously difficult for Weiss to argue the relevancy and materiality of those reports. The defendants do not know what information they disclose. Yet, they were reports on the surveillance of the defendant Buchalter and it may well be that the information therein contained would greatly weaken if not completely refute Berger's story about the occurrences on September 11, 1936, and Tannenbaum's story of a "confession" made in his presence at 200 Fifth Avenue after Rosen was murdered.

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* The contrary is true in the State of New York.

The Court of Appeals, in denying reargument, said that the records in question were examined by it and that the so-called surveillance amounted to very little.* "It was of the entrance and lobby of the office building and not of the floor upon which the defendant Buchalter had his office. The reports established that the defendant could and did elude the police at will" (R. 4120).

But Berger testified that on September 11, when he and Buchalter went from the latter's office to the East Side of New York for the purpose of meeting Weiss, they went out of the main entrance of the building.

We submit to the Court that there is little difference in principle between a prosecutor's withholding of relevant information and his presentation of false testimony (Cf. *Mooney* v. *Holohan*, 294 U. S. 103, 112-113). Both result in the deprivation of a fair trial. This is not a case where the information was sought in advance of trial (*People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24). A witness was on the stand, the records had been subpoenaed and were within the jurisdiction of the Court. We submit that particularly in a capital case, fairness required that they be made available to the petitioner. In *People* v. *Walsh*, 262 N. Y. 141, 150, the Court of Appeals quoted with approval Judge Cooley's statement in *People* v. *Davis*, 52 Mich. 569:

> "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

"Criminal proceedings", said the Court in *Centosamore* v. *State*, 105 Nebraska, 452, 455, "are instituted with the object, not alone of securing convictions, but of getting as near to the truth as possible on the question of the guilt or innocence of the accused."

* But that was a question of fact for the jury. The defendants were entitled to this evidence and the jury to consider its weight.

Finally, the record discloses that in the Court of Appeals, a majority of the Judges,—Loughran, Desmond, Rippey, JJ., and Lehman, C.J.,—were not convinced beyond a reasonable doubt of the guilt of the defendants. That Court, upon appeal capital case, is obliged to weigh the evidence and form a conclusion as to the facts.

> *People* v. *Crum*, 272 N. Y. 348, 350;
> Constitution of the State of New York, Article VI, Section 7, Appendix G.

Despite the doubt expressed, the judgment was affirmed.

## Conclusion

We cannot refrain from expressing the thought that the printed word, setting forth legal argument, seems impersonal and remote from the human side of the questions involved. The concept of due process is not based on abstract theory; it is the very foundation of our way of life. We all feel more secure in our daily lives in the knowledge that we in the United States are protected by the law from judgments based on hysteria and passion, even from the tyranny of men's emotions, and that our property, and certainly our lives, are safe against deprivation except after fair trial where the facts are determined by a jury of our peers. As opposed to a society based on apprehension and fear, where no man can be sure where he stands or how he will fare, ours is a society of freedom and security where individuals, whatever their status—even "bad" men—are protected against public clamor and official vindictiveness by constitutional guaranties. This applies even to a lowly individual in the death house under sentence of execution. We submit that the presumption of innocence prevails until after judgment of guilt on fair trial by an impartial judge and jury. It is unthinkable that a man may be marched to

the electric chair, strapped in, and his life snuffed out by the State, not because of what he did, but because of the way he was tried.

> "The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life" (Roberts, J., in *Snyder* v. *Massachusetts*, 291 U. S. 97, 127).

If, as the record shows, the trial was had in a hostile atmosphere; if the important witnesses for the prosecution were gangsters, thugs and murderers who had every reason even that of life itself to perjure themselves; if these despicable characters had every opportunity to correlate the story; if the court explained and minimized their perjuries; if the prosecutor improperly assured the jury that the criminal witnesses of the prosecution would suffer punishment; if important evidence was excluded and improper evidence of a highly prejudicial character admitted; if the trial judge disparaged cross examination by which in the words of Judge Lehman the testimony of the chief prosecution witnesses was "impeached, if not completely destroyed"; if the attorneys for the defendants were browbeaten by the Court and arguments made by them were discredited; if the trial Judge usurped the functions of the jury by improperly instructing them on questions of fact; if the trial was one in form rather than in substance—if all of these things are true, can it be said that these defendants had a jury trial at all? If it be a fact, as stated by Judge Rippey, that the defendants under the circumstances here did not have "even a remote outside chance of any free consideration by the jury of their defenses", is there not a deprivation of due process as guaranteed by the Fourteenth Amendment?

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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## Appendix A

### Article 1, Section 1 of the Constitution of the State of New York

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

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## Appendix B

### Article 1, Section 2 of the Constitution of the State of New York

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

## Appendix C

### Section 1041 of the Penal Law of the State of New York

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

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## Appendix D

### Section 419 of the Code of Criminal Procedure of the State of New York

On the trial of an indictment for any other crime than libel, questions of law are to be decided by the court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

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## Appendix E

### United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Appendix F

Judicial Code of the United States,
Section 237 (b), as amended, 28 U. S. C. A.,
Section 344 (b)

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

## Appendix G

### Article VI, Section 7 of the Constitution of the State of New York

Jurisdiction of Court of Appeals

The jurisdiction of the Court of Appeals, except where the judgment is of death, or where the appellate division, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact and renders final judgment or a final order thereon, shall be limited to the review of questions of law; but the right to appeal shall not depend upon the amount involved.

Appeals may be taken to the Court of Appeals in the classes of cases enumerated in this section.

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(The remainder of this article is omitted as not relevant.)

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## Appendix H

### Section 389 of the Code of Criminal Procedure of the State of New York

A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.